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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Docket No. 3:16-md-2738-FLW-LHG

IN RE:

JOHNSON & JOHNSON TALCUM STATUS CONFERENCE VIA
POWDER PRODUCTS MARKETING, REMOTE ZOOM
SALES PRACTICES AND PRODUCTS VIDEOCONFERENCE
LIABILITY LITIGATION

* * * *

THURSDAY, SEPTEMBER 16, 2021

* * * *

BEFORE: SPECIAL MASTER JOEL SCHNEIDER, USMJ, RETIRED
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Transcript of proceedings in the

7 above matter taken stenographically by

8 Theresa Mastroianni Kugler, Certified Court Reporter,

9 license number 30X100085700, Notary Public of the

10 State of New Jersey and the Commonwealth of

11 Pennsylvania, VIA ZOOM REMOTE VIDEOCONFERENCE,

12 commencing at 4:59 PM.

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1 SPECIAL MASTER SCHNEIDER: We're on the
2 record in the Talc Federal MDL.

3 The reason we're here is because late
4 yesterday we received a letter from the University of
5 California regarding an order that I had entered
6 several weeks ago. For the record, it was the
7 Special Master Order Number 10. It was dated August
8 30th.

9 So in order to address this issue, we
10 had originally scheduled Zoom for Monday, but
11 Ms. Sharko alerted me that the deposition of Dr.
12 Smith-Bindman is upcoming and today is the deadline,
13 pursuant to the court's scheduling order, to produce
14 the documents. So without thinking too much, I
15 rushed and scheduled a Zoom at 5 o'clock today, not
16 realizing or forgetting about the Jewish holiday
17 today.

18 So I do want to apologize for those who
19 are celebrating the holiday who can't be on this
20 Zoom. If I had given the matter appropriate thought,
21 I would not have scheduled it today, I would have
22 waited a day or two not to interfere with the
23 religious observance. But I don't think anyone is
24 going to be prejudiced because we have
25 representatives of the interested parties on the

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1 Zoom.

2 So why don't we start with the entries
3 of appearance starting with the plaintiffs.

4 Who is going to represent the
5 plaintiffs on this Zoom?

6 MR. LAPINSKI: Your Honor, good
7 afternoon. Daniel Lapinski from the Motley Rice Law
8 Firm on behalf of the plaintiffs.

9 MS. O'DELL: Leigh O'Dell from Beasley
10 Allen on behalf of the plaintiffs.

11 MS. PARFITT: Your Honor, Michelle
12 Parfitt on behalf of the plaintiffs.

13 SPECIAL MASTER SCHNEIDER: And for the
14 defendants?

15 MS. SHARKO: Susan Sharko from the
16 Faegre Drinker Law Firm for the Johnson & Johnson
17 defendants.

18 SPECIAL MASTER SCHNEIDER: And is there
19 a representative of the University of California on
20 the Zoom?

21 MS. HAAS GEORGIEV: Yes, sir. Yes,
22 your Honor. It's Christine Haas Georgiev, Principal
23 Campus Counsel for the Regents of the University of
24 California, San Francisco.

25 SPECIAL MASTER SCHNEIDER: Okay. So

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1 just by way of introduction, I'm the Special Master
2 in the Talc MDL. I've communicated with Chief Judge
3 Wolfson about this matter and we both agreed that
4 since the letters you sent concerned an order that I
5 had entered, that it's appropriate for me to address
6 this dispute.

7 I have the letter that The Regents
8 served yesterday. I also have the letter that I
9 received today. It's been fully reviewed as well as
10 the case that you cited, so you don't have to be
11 concerned that although the letter came in this
12 afternoon that it wasn't reviewed. It was reviewed.

13 So there are two main parts, issues
14 that I would like to address. One is the procedural
15 issues and two is the merits.

16 Procedurally, I just have a question
17 whether, in my words, the dispute was appropriately
18 teed up. I'm not quite sure if a motion is
19 necessary. Certainly, reconsideration under the
20 rules is untimely and I don't know if the moving
21 party, The Regents, even has standing to object to a
22 subpoena directed to Dr. Smith-Bindman, unless you
23 tell me you're representing Dr. Smith-Bindman.

24 So they're the procedural issues. And
25 after we get through that, we can get to the merits

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1 of the dispute.

2 So let me hear from counsel in the
3 case, first. I mean I'm not quite sure what the
4 correct procedure is or should have been for The
5 Regents, the university, what have you, whatever they
6 want to be called, to raise this issue. Should they
7 have filed a motion to intervene? Should they have
8 filed a motion for a protective order? I'm not quite
9 sure procedurally how they should have done it apart
10 from the issue of standing to object to a subpoena
11 directed to a third person.

12 So I guess, Ms. Sharko, do you want to
13 address that in the first instance?

14 MS. SHARKO: Sure, your Honor. And I
15 did not receive any submissions that were made today.
16 We only got the letter that was sent to Chief Judge
17 Wolfson yesterday.

18 SPECIAL MASTER SCHNEIDER: Rachel, do
19 you have a copy of that letter, the one that just
20 came in? It was largely duplicative. Not identical,
21 but it was largely duplicative, so I don't think
22 you're missing something. So while we're on the
23 phone, what I'm going to do is -- Rachel, are you
24 there?

25 MS. GOODMAN: I'm here.

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1 SPECIAL MASTER SCHNEIDER: I'm going to
2 forward you a copy of the letter. I'm doing that
3 right now. And I would ask that you just serve
4 everybody on the Zoom with the letter while we're
5 talking.

6 MS. GOODMAN: Okay. Great. I'll send
7 that right out.

8 MS. SHARKO: Thank you.

9 I don't believe that the University of
10 California at San Francisco or The Regents or
11 whatever it is has standing to make this argument.

12 What we're dealing with is a study that
13 Dr. Smith-Bindman did as part of her work as an
14 expert witness for the plaintiffs. I believe that
15 the study was funded in whole or in part by the
16 plaintiffs' lawyers, the doctor relies on it in her
17 expert report, and I'm fairly certain that she wasn't
18 acting on behalf of the university or The Regents
19 when she did this. I mean the woman is a radiation
20 oncologist. This is not even within her research
21 wheelhouse.

22 But going back to the question, no, I
23 don't think the university has standing at all. And
24 beyond that, the arguments that were raised by the
25 university, at least in the first letter from

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1 yesterday, are precisely the same arguments that the
2 plaintiffs made in opposition to our initial
3 application. And those arguments were thoroughly
4 considered by your Honor. And yes, the application
5 is untimely in any event.

6 SPECIAL MASTER SCHNEIDER: And before
7 we get to the merits, I just want to deal with the
8 procedural issues first.

9 For the university, counsel, do you
10 want to be heard on this?

11 MR. LAPINSKI: Your Honor, I'd like to
12 be heard as well and I don't know if you want me
13 to --

14 SPECIAL MASTER SCHNEIDER: Okay.

15 MR. LAPINSKI: -- speak before or after
16 counsel for the university.

17 SPECIAL MASTER SCHNEIDER: Well, let me
18 hear from the university first --

19 MR. LAPINSKI: Sure.

20 SPECIAL MASTER SCHNEIDER: -- because
21 Ms. Sharko -- well, Ms. Sharko is correct that we
22 argued this issue previously. The arguments were
23 similar to those presented now, not quite identical.
24 Certainly the university has cited cases that the
25 plaintiffs didn't cite, but the plaintiffs were heard

1 on the issue and the court didn't rule in their
2 favor. So let me hear from the university first and
3 then, Mr. Lapinski, we'll hear from you.

4 MR. LAPINSKI: And your Honor, I'm
5 sorry. If I could just make one or two statements
6 just to clear up a few things that Ms. Sharko said
7 before anyone from the university talks.

8 And the couple points that I want to
9 clear up is that, one, the work that we're talking
10 about is not work that was funded by plaintiffs'
11 counsel. So Ms. Sharko's representation that it's
12 work that was funded by plaintiffs' counsel is
13 incorrect because we haven't paid for any of the work
14 that Dr. Smith-Bindman did.

15 The second point that she brought up
16 was that it's work that was done as part of her work
17 as an expert witness, which it was not. The work
18 that we're dealing with right now is work that was
19 done by Dr. Smith-Bindman independently after she had
20 submitted her expert report, after she had provided
21 testimony as it relates to her expert report.

22 In a subsequent trial, Dr.
23 Smith-Bindman testified to the fact that it was the
24 interest that she had in the topic that she wrote her
25 expert report on that led her to decide, within the

1 university context, to do the research that is
2 currently at issue now. But it's not research that
3 she did as part of her work as an expert and it's not
4 research that she's relying upon in support of her
5 expert report.

6 And then the last thing I'll bring up
7 is that to say that this is something that's not in
8 her wheelhouse as a researcher, Dr. Smith-Bindman is
9 a renowned epidemiologist. And that's exactly the
10 work that she's doing here. So I just wanted to
11 bring those points up, your Honor, and then I
12 apologize that I jumped in.

13 SPECIAL MASTER SCHNEIDER: Can I ask a
14 question? Because you raised a critical point, Mr.
15 Lapinski. And it's the first time I'm hearing this
16 argument from plaintiffs.

17 In your words, you argued that Dr.
18 Smith-Bindman is not, quote/unquote, relying on this
19 study or these documents in connection with this
20 case. That's not the standard for discovery of an
21 expert's material. The standard is whether it was,
22 quote/unquote, considered. And as I stated in my
23 oral opinion when this issue came up, that's given a
24 very broad reading.

25 So even if a testifying expert doesn't,

1 quote/unquote, rely on something, if they considered
2 it, it's discoverable.

3 This is the very first time I'm ever
4 hearing some type of insinuation that Dr.
5 Smith-Bindman did not consider this information in
6 connection with her expert opinion. It certainly
7 wasn't argued the last time we were together and I
8 don't even know if you're making that argument.

9 Are you arguing that Dr. Smith-Bindman
10 did not, quote/unquote, consider this information?

11 MR. LAPINSKI: Your Honor, what I can
12 say as I sit here without me confirming with Dr.
13 Smith-Bindman, and Ms. O'Dell might be able to jump
14 in and provide more substance to that, I know that
15 the report that she submitted in the MDL and the
16 amended report in the MDL, she's not relying upon the
17 information. I don't believe she considered it, but
18 I have to defer to Ms. O'Dell who is closer to the
19 issue than I am in that regard.

20 SPECIAL MASTER SCHNEIDER: Ms. O'Dell,
21 do you have anything to add?

22 MS. O'DELL: Your Honor, she certainly
23 was aware of it because obviously the work was
24 ongoing. Is that considering it, you know, for
25 purposes of reaching her opinion? No. Her opinions

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1 are the same. But she certainly had information
2 about the study because it was ongoing with her
3 colleagues there at UC San Francisco.

4 So Dan is quite correct on the points
5 he made. She doesn't rely on it to reach her
6 opinions. Her opinions are based on her systematic
7 review that's outlined in her report that has a
8 different design in terms of the studies included and
9 the results reached.

10 So that's how I can respond to that and
11 we can certainly add more detail after talking with
12 Dr. Smith-Bindman, but that's my understanding.

13 SPECIAL MASTER SCHNEIDER: Ms. Sharko?

14 MS. SHARKO: Yes. So first of all, we
15 have no affidavits from Dr. Smith-Bindman. We have
16 no discovery on this study because it's brand new.
17 If we go back to Dr. Smith-Bindman's first report,
18 she did a study which was discussed in her expert
19 report. She was deposed on it. The underlying
20 documents were produced. And a lot of questions were
21 raised about that first study and how it was done.
22 So many questions were raised that the judge in
23 Philadelphia, where a trial is ongoing, wouldn't let
24 it come into evidence. I know plaintiffs were then
25 trying to get reconsideration of that ruling, I don't

1 know if the judge ruled.

2 SPECIAL MASTER SCHNEIDER: Are we
3 talking about the new documents?

4 MS. SHARKO: No. No. We're talking
5 about her first study.

6 So then after the Daubert Hearing, as
7 your Honor knows, we went to the amended expert
8 reports. And Dr. Smith-Bindman, in that expert
9 report, discusses the new study, which I believe she
10 said in her expert report is similar to the old
11 study, but different. She brought in different
12 people to help her. And we don't know a lot about
13 that because we haven't taken her deposition.

14 I think that discovery on the funding
15 of that study will be interesting. We haven't had
16 that yet. But to say that she didn't consider that,
17 I don't know how you could say that. It's work that
18 she did. It's directly on point with her opinions
19 and I don't see how that bell can be unrung, how she
20 can be divorced from that.

21 SPECIAL MASTER SCHNEIDER: Did she cite
22 to it in her supplemental report?

23 MS. SHARKO: Yes. That's how --

24 (Indiscernible crosstalk)

25 MS. O'DELL: -- I've got it in front of

1 me.

2 The only thing that she said is that --
3 and I'm just turning the report in front of me. And
4 if the court is interested, I'd be happy to clarify
5 maybe some misunderstandings Ms. Sharko has about
6 what's occurred in Philadelphia, because I've been
7 very involved in that.

8 But she goes on to say in her report
9 that -- excuse me, I'm on the wrong page, your Honor.
10 Just let me turn to it because I want to be precise.

11 I apologize for the moment.

12 MR. LAPINSKI: On page 17, Leigh.

13 MS. O'DELL: Thank you.

14 What she says in her report dated July
15 the 2nd is that she decided to publish a
16 meta-analysis and that it's a separate analysis. It
17 was performed with colleagues from UC San Francisco
18 who are not involved in litigation.

19 She did disclose that she had
20 registered the study and that it would have similar
21 but not identical methodology. And that she included
22 not only the published studies but she also, this is
23 what she said, that she obtained additional raw data
24 from one of the cohort studies that have been at
25 issue in the case, the Nurses' Health Study One,

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1 which has not been previously made available in the
2 public. So it's a different study.

3 I say, your Honor, she was certainly
4 aware of that information, but it's not something
5 that is being considered for purposes -- she's aware,
6 but not being considered for purposes --

7 SPECIAL MASTER SCHNEIDER: Why did she
8 cite to it, if she didn't consider it?

9 MS. O'DELL: I think she wanted to be
10 forthright. I mean she wanted to say it was coming
11 and for full disclosure purposes.

12 SPECIAL MASTER SCHNEIDER: In essence,
13 is she going to say that since she was last deposed
14 they did a similar, although not identical, study and
15 it supports the results of the initial study?

16 MS. O'DELL: I don't know. I don't
17 know that she'll say that, your Honor. I think that
18 the study will stand on its own. It will be in the
19 literature and it will be -- it's a distinct study
20 with other colleagues -- that she's done with other
21 colleagues at UC San Francisco and it's my
22 understanding that others of her colleagues have
23 really led the study. That's my understanding.

24 MS. SHARKO: But, Judge, the issue of
25 what the epidemiology shows is the whole purpose of

1 Dr. Smith-Bindman as an expert witness. And it's
2 inconceivable that she's done this study and she's
3 not going to talk about it, that she's gotten new
4 data, if that's the case as Ms. O'Dell suggests. And
5 that Dr. Smith-Bindman is just going to take herself
6 back to 2018 and ignore anything she's learned since
7 then. The reality is that she's trying to get the
8 study published and then she and the plaintiffs are
9 going to rely on it in litigation. I don't see how
10 one can draw any other conclusion. And when you look
11 at her expert report in this case, 75 percent of it
12 is about epidemiology. That's why she was brought
13 in. And she talks in the study, in the new expert
14 report, about how she's concerned with the reviews
15 that have been undertaken so far, the meta-analyses
16 and the need for her to do her own.

17 So to say that this is not something
18 she considered, I just don't accept that. The
19 evidence does not support that. And there is no
20 affidavit from her on any of these issues.

21 SPECIAL MASTER SCHNEIDER: Let me turn
22 to the university's counsel. Where we were is on the
23 first main issue that I'm concerned about
24 procedurally, procedurally, is this issue ripe and
25 was it appropriately addressed?

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1 One, should you move to intervene and
2 file a motion?

3 Two, do you have standing to object to
4 a subpoena directed to Dr. Smith-Bindman?

5 And three, we know, if you're asking
6 for reconsideration, we know under the rules it's
7 late.

8 So could you address those issues?

9 MS. HAAS GEORGIEV: Yes, your Honor.
10 So my understanding, based on communications from my
11 chief campus counsel, is that she just learned about
12 this entire issue, I believe, within the last couple
13 of days. So I don't know what else she could have
14 done other than to immediately notify you -- to be
15 honest with you, I don't want to misrepresent
16 anything I say. I learned of this issue this
17 morning. I've been trying to prepare myself and be
18 adequately prepared for this hearing.

19 But based on the information that I'm
20 aware of, and UCSF is a very honest institution, my
21 understanding is that this is preliminary research.
22 As such, it would be the property of UCSF. And also,
23 the research not only of Dr. Smith-Bindman, but the
24 research of her fellow collaborators. And so this
25 has, you know, become a surprise to us.

1 Irrespective, under both California and
2 federal law, preliminary research that's not final
3 would not normally be subject to disclosure. I can't
4 speak to any of the past history that's occurred
5 because I have no information about it. But that
6 would be the general belief and premise upon which we
7 stand.

8 I would seek guidance from you as to
9 what we should do given where this case seems to be.
10 But generally, this is property that, as I
11 understand, has not been vetted or peer-reviewed yet,
12 has not been published, has many people participating
13 in it, and will affect the institution and the other
14 research collaborators and should not be divulged. I
15 think we should have at least an opportunity to
16 ascertain the facts, be able to potentially obtain a
17 declaration from Dr. Bindman.

18 We're not seeking to cause any havoc
19 with obviously a serious case that's pending, but I
20 believe we should be able to try to protect our
21 rights and those of our other researchers along with
22 Dr. Smith-Bindman.

23 SPECIAL MASTER SCHNEIDER: My response
24 to that is this: I don't know exactly what happened,
25 but I suspect what you represent is correct, that the

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1 university only very recently found out about this.
2 And I don't -- I'm not going to question that. I'm
3 going to assume that's the case. But I can't fault
4 the defendants for that because I don't think they
5 had any duty to notify the university of this issue.
6 I'm going to leave the plaintiffs aside. I'm not
7 sure whether or not they had a duty, but certainly
8 Dr. Smith-Bindman had to have known about the
9 subpoena and she could have alerted the university to
10 the issue. And apparently she didn't.

11 The problem we have here is, you know
12 and we all know that this is a very serious case,
13 there is tens of thousands of these cases that are
14 pending not only in New Jersey but around the
15 country. There is a scheduling order in place. Dr.
16 Smith-Bindman apparently is scheduled to be deposed
17 next week. It's been represented that today is the
18 deadline to produce the subject documents. And
19 although I'm very sympathetic to the university's
20 plight that they only found about this, I can't fault
21 the defendants for that. And --

22 MS. HAAS GEORGIEV: But the university
23 shouldn't be prejudiced either.

24 And again, I would say it's their
25 property along with all of the doctors involved, not

1 just one. So I think there should be some recourse
2 available to the university. And again, I don't
3 know the suit or -- I understand the gravity, but I
4 don't know the breadth and scope, but I just think
5 there has to be a way for the university to be given
6 an opportunity, even on an expedited basis, to be
7 able to protect its rights.

8 SPECIAL MASTER SCHNEIDER: Well, let me
9 ask you this, and maybe we're combining the merits
10 and the procedure here --

11 MS. HAAS GEORGIEV: Apologies.

12 SPECIAL MASTER SCHNEIDER: -- which is
13 fine.

14 I understand the university's plight,
15 I'm sympathetic to the university's plight. But I
16 guess one of the big questions I have is, under the
17 current scheme and the order that's been entered, how
18 is the university prejudiced in any manner? Because
19 whatever documents are going to be produced in the
20 first instance are going to be produced under an
21 "attorneys eyes only" designation. So only the
22 attorneys are going to see it, the witness is going
23 to be questioned about it. And one thought that
24 occurs to me during this discussion is if Ms. Sharko
25 is going to question the witness about these

1 documents, unquestionably, and if it turns out that
2 Dr. Smith-Bindman didn't, quote/unquote, consider
3 these documents in forming her opinions, I'm going to
4 order the documents be returned.

5 So under that scenario, how is the
6 university prejudiced? Doesn't that result in a fair
7 balance of the parties' interests?

8 The information isn't released to the
9 public, it won't be released to the public unless and
10 until there is a court order that reduces the
11 designation or the parties agree to it. And if it
12 turns out that under the applicable rules the
13 information is not discoverable, i.e., it wasn't
14 considered by Dr. Smith-Bindman, the documents are
15 going to be returned.

16 So how is the university prejudiced
17 under that scenario?

18 MS. HAAS GEORGIEV: So I'm just
19 learning of this for the first time.

20 So under your scenario, assuming no
21 leaks and assuming that they weren't considered and
22 the documents are returned to the university, they
23 wouldn't be prejudiced.

24 But let's say you decide, you know,
25 they had been considered. There are other peoples'

1 interests in addition -- Dr. Smith-Bindman's for
2 sure, but also the university's and other
3 researchers. And the research isn't final.

4 It's very unusual to have disclosure
5 prior to final peer-review, publication, et cetera.
6 So I just -- you know what, I understand your dilemma,
7 I just hope with this attorney peer-review that you
8 guys are doing your case -- because it sounds like
9 you're going to order that, I just hope that -- I do
10 think that we should have intervener rights or
11 something, we do have a personal interest in the
12 situation.

13 And I don't know the remedy. I can't
14 tell you after six hours what should be done, but I
15 do think we have a vested interest in what occurs and
16 yet what you're describing to me is a rational
17 discovery process and I can't argue with that.

18 SPECIAL MASTER SCHNEIDER: One of the
19 key differences between this case and, say, the
20 Humane case that you cited is this case is in the
21 context of a federal litigation. And this issue came
22 up in oral argument and almost the same exact
23 arguments were made at oral argument about it's going
24 to have a chilling effect and this and that,
25 et cetera, et cetera. And my response was, well,

1 that doesn't trump the Federal Rules of Civil
2 Procedure. The Federal Rules of Civil Procedure say
3 that if an expert, quote/unquote, considered
4 materials in forming her opinions, it's discoverable.

5 Dr. Smith-Bindman is a sophisticated
6 person, she knew what she was getting into when she
7 signed up to be a trial expert, and this just, in my
8 words, comes with the territory.

9 MS. HAAS GEORGIEV: Yeah. So
10 understood.

11 Can I just raise one more issue? And
12 you may not consider it, but in California we have,
13 no different than FOIA, a California Public Records
14 Act. And in that case, because we're a California
15 constitution, we have the authority to make a
16 determination as to what documents are exempt. And
17 under the California Government Code 6254, whether
18 it's under trade secret or the balancing test, those
19 records would be exempt under California law. And I
20 also think under federal law under the OMB Circular.
21 So I don't know that you'll find that compelling, but
22 that is a true statement, your Honor, and I just
23 wanted to communicate that.

24 SPECIAL MASTER SCHNEIDER: Well, it's
25 appropriate for you to state that on the record, but

1 I don't find that compelling because the guidance
2 that the court has to look at is Federal Rule of
3 Civil Procedure 26 which talks about discoverable
4 material, standard of relevance, proportionality,
5 et cetera, et cetera.

6 But I think the bottom line is this: I
7 am sensitive to the interests of the university, but
8 the way this is going to play out, I don't think
9 their interests are going to be prejudiced.

10 The information is going to be
11 produced, it's going to be produced hopefully by
12 today because that's the court's order. The
13 information is going to be produced under "attorneys
14 eyes only" designation. And I'm going to make my
15 order clear, if it's not clear now, that it will
16 remain under that designation until the court orders
17 it reduced or lessened.

18 If that application is made, there is
19 no question the university is going to be put on
20 notice of it and then you'll have a full opportunity
21 to be heard.

22 So let's play this out. Ms. Sharko
23 gets the documents, she takes her deposition, witness
24 testifies she didn't consider the documents, it's
25 easy, they'll be returned.

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1 Ms. Sharko takes the deposition, likely
2 the witness is going to testify that she considered,
3 under the broad meaning under the case law, the
4 documents.

5 Okay.

6 Ms. Sharko is then going to say, okay,
7 we want to show these documents to our expert or
8 consultant or client. They're going to have to make
9 an application, notice is going to go to university
10 and then we'll hash out these issues about the
11 merits. You can argue privilege, what have you. But
12 I don't think, in the context of this case, I don't
13 think the California statute that you're relying on
14 trumps the Federal Rules of Civil Procedure.

15 MS. HAAS GEORGIEV: My only point was,
16 ours aligned with the OMB Circular.

17 So understood, your Honor. I
18 understand you're going to make a decision and it's
19 very Solomon-like and I just wanted to present our
20 arguments and our feelings about the situation.

21 SPECIAL MASTER SCHNEIDER: Ms. Sharko,
22 I interrupted you. Did you want to add something?

23 MS. SHARKO: Yes.

24 Number one, just so Ms. Georgiev is
25 aware, we first requested these documents on July 22.

1 So this is not something that is new.

2 When Dr. Smith-Bindman learned of that
3 request, I have no idea, but I just want to make the
4 record clear that this dispute has been out there for
5 a while.

6 Number two, I suspect that had we, as
7 defense lawyers, gone to the university to talk about
8 what plaintiff's expert was doing, we would have been
9 soundly criticized for that and accused of somehow
10 interfering with Dr. Smith-Bindman.

11 And number three, while I don't think
12 your Honor has seen the red lined version of Dr.
13 Smith-Bindman's report, I'm happy to submit it to
14 you, but there are references and discussions of this
15 study throughout that report. And so I think
16 everybody should just be on notice that if Dr.
17 Smith-Bindman is somehow prepared to come in and say
18 no, I didn't consider it and thinks that that will be
19 the end of it, I just want you to know that we will,
20 we will be back. Because I suspect that the record
21 will show that even if she says I didn't consider it,
22 it is part and parcel of the fabric of what she's
23 relying on.

24 And certainly if this study is
25 published between now and the time of trial, all the

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1 experts are going to be relying on it. And then
2 we'll be in the position of trying to catch up on
3 discovery.

4 I appreciate that you've ordered it, I
5 just wanted to make those points for the record.

6 SPECIAL MASTER SCHNEIDER: Well, I'm
7 not going to be surprised if the issue comes up
8 again, but I think we have a very prudent way to
9 proceed that protects everybody's interests.

10 J&J's interests are protected because
11 it's going to get the documents and have a full and
12 fair opportunity and complete opportunity to question
13 Dr. Smith-Bindman.

14 The university is protected because
15 only the attorneys are going to see the documents.

16 And if, as I suspect down the road, J&J
17 asks to lessen or reduce the designation, my order is
18 going to provide that a formal application has to be
19 made with notice to the university. So you'll have a
20 full and fair opportunity at that time to present the
21 views of your client.

22 I'm afraid I can't give any legal
23 advice about the right way to present the issue
24 procedurally, but between now and whenever it comes
25 up again, you'll --

1 MS. HAAS GEORGIEV: I'll figure it out
2 between now and then.

3 MR. LAPINSKI: And, your Honor, if I
4 may, you had asked me to defer until after the
5 university had the opportunity to speak as far as the
6 procedural issues are concerned.

7 SPECIAL MASTER SCHNEIDER: Sure.

8 MR. LAPINSKI: I know that the letter
9 that was sent yesterday by the university requested
10 that the court reconsider the decision that it had
11 made in regard to this issue. And while it uses the
12 word reconsider, I don't think that that at all
13 undermines the right of the university to be able to
14 intervene in a case where it's their product, their
15 work product that is at issue. So I think
16 procedurally they have the right to intervene. I
17 think procedurally they would also have the right to
18 move to quash the subpoena. And I just wanted to
19 bring those points up.

20 MS. HAAS GEORGIEV: I just appreciate
21 the fact that his Honor is going to provide us with
22 notice as well. So thank you. Thank you both.

23 SPECIAL MASTER SCHNEIDER: Mr.
24 Lapinski, I don't think it would be a request to
25 quash the subpoena at that point because presumably

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1 the cat is out of the bag as of today.

2 MR. LAPINSKI: Right.

3 SPECIAL MASTER SCHNEIDER: But I think
4 you know, because we've been together so many times,
5 my goal and effort is to decide issues on the merits.
6 And I recognize the equities of the situation, that
7 the university has a significant interest, but so do
8 plaintiffs and so do defendants. So they all have to
9 be taken into consideration. And when there is any
10 question or doubt, I'll always go to a decision on
11 the merits. And if I have to do some gymnastics to
12 get there, I will. And I think you understand what
13 I'm trying to say.

14 MR. LAPINSKI: Yes, your Honor.

15 SPECIAL MASTER SCHNEIDER: So let me
16 just sum up and then we'll see if there is anything
17 for the good of the order to say on this issue.

18 The Master -- I just don't like calling
19 myself Master. Whatever I am.

20 MS. PARFITT: Special Master, that's
21 even better, not just Master, you're the Special
22 Master.

23 SPECIAL MASTER SCHNEIDER: I don't like
24 that. Legally it's fine, but I have problems calling
25 myself that.

1 Anyway, the order will be that the
2 documents are going to be produced in accordance with
3 whatever schedule exists now. They're still under an
4 "attorneys eyes only" designation, will remain under
5 "attorneys eyes" designation absent a contrary court
6 order; that the deposition is going to be taken; that
7 if the expert testifies she didn't consider this
8 material and if J&J agrees that she didn't consider
9 it, the documents have to be returned.

10 If J&J refuses to return the documents
11 for some reason, plaintiffs or the university can
12 make an application that the documents be returned.

13 In the likely event, although my
14 prediction is in the likely event, but we don't know
15 what's going to happen, it turns out the witness did
16 consider this information, then the likely next step
17 will be J&J will want to reduce the designation so it
18 can give the documents to some other people, clients,
19 consultants, what have you, to prepare for trial,
20 they'll have to do that on a formal application with
21 notice, obviously, to the plaintiffs and the
22 university. And then we'll set a reasonable schedule
23 for everybody to be heard on whatever issues they
24 want to be heard on and we'll decide the issue.

25 So I think that's a very fair way to

1 balance everyone's interests. And in honor of the
2 religious holiday, like counsel for the university
3 said, it's a very Solomonic -- is that how you
4 pronounce it?

5 MS. HAAS GEORGIEV: I said Solomon-like
6 approach.

7 MS. PARFITT: Your Honor, if I could be
8 heard on one thing, it's more logistics.

9 Because this issue has come up and
10 because your order indicates that we are to produce
11 them today and counsel for the university has
12 explained the machinations and the issues that
13 they've been presented with, I don't know what
14 position we're in to actually get them to the
15 court --

16 SPECIAL MASTER SCHNEIDER: Do you have
17 them? Do you have the documents?

18 MS. PARFITT: Do I? I'll let others
19 speak to that, but let me make one proposal. If this
20 is going to take us a little time to speak with
21 counsel, and remember, they are in control of some of
22 these documents, so --

23 SPECIAL MASTER SCHNEIDER: If they were
24 due today, shouldn't they be in an envelope or an
25 email ready to press the button or put in the

1 mailbox?

2 MS. PARFITT: Dan, maybe you want to
3 explain that?

4 MR. LAPINSKI: Yeah.

5 MS. PARFITT: What I was going to say
6 is, to make this fair, which we are certainly trying,
7 and appreciating the court's order and the ruling, if
8 it takes us a day, we can extend that depo if we
9 still need to have the seven days. But, Dan, you can
10 explain --

11 SPECIAL MASTER SCHNEIDER: You can work
12 it out, maybe just work it out with Ms. Sharko.

13 MR. LAPINSKI: Your Honor, what I would
14 say in response to the question that you've asked is,
15 I have been in touch with Dr. Smith-Bindman and we
16 have been exchanging emails specifically in regard to
17 the point that you just brought up.

18 To the extent that there was a decision
19 this afternoon, can we click a button and have
20 everything, and while I would like to say the answer
21 is yes we can click a button and have everything, we
22 haven't had any documents produced to us yet for the
23 same reason that counsel is on the phone today saying
24 that they don't want to produce them to defense
25 counsel, because they consider it to be product that

1 they don't want produced. So we don't have anything
2 yet. But based upon what you just said on the record
3 and what your decision is going to be, we're going to
4 start to work to get those documents brought in. We
5 still have to be able to look at them and determine
6 what is responsive, what's not responsive, what may
7 be missing that makes us go back and ask questions,
8 well, what about request number so-and-so, do you
9 have any documents. So I'll be working tonight in
10 order to try to make sure that we can make a
11 substantive production to opposing counsel tonight.

12 SPECIAL MASTER SCHNEIDER: Ms. Sharko,
13 I know you're anxious, but just wait a second. I
14 know you wanted to jump in there.

15 One, I'm a little surprised because --
16 I don't know, I've been told that the documents were
17 due today.

18 MS. PARFITT: Correct.

19 SPECIAL MASTER SCHNEIDER: This issue
20 with the university just came up late yesterday, so I
21 would think that pretty much everything should have
22 been done to get the documents timely produced.

23 That being said, okay, we live in the
24 real world, right? Try to work out a schedule with
25 J&J and see if you can work it out. Under no

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1 circumstances, no circumstances is the doctor's
2 deposition being put off.

3 MS. PARFITT: Fair enough.

4 SPECIAL MASTER SCHNEIDER: If it turns
5 out that J&J can satisfy me that they don't have
6 enough time to review these documents and prepare,
7 I'm going to order Dr. Smith-Bindman to be produced
8 again for deposition at her cost or plaintiffs' cost
9 because J&J shouldn't be prejudiced because the
10 documents were not timely produced.

11 So I don't know if I took the wind out
12 of your sails, Ms. Sharko, but I'm going to turn the
13 floor over to you.

14 MS. SHARKO: Thank you, Judge, but we
15 respectfully object to that way of proceeding.

16 We've been seeking these documents
17 since July 22nd. The deposition of Dr. Smith-Bindman
18 has been scheduled and adjourned by the plaintiffs
19 several times. Your honor ruled back a month or two
20 or three ago, whenever you ruled, the documents would
21 be produced within seven days before her deposition.
22 It's clear we're not going to get those documents
23 seven days before the deposition. We need time to
24 review and analyze the documents and make sure
25 they're complete.

1 Frankly, seven days was too short, but
2 that's what your Honor ruled. So our preference is
3 that you set a deadline for complete production of
4 the documents and then we take the deposition
5 thereafter. We only have four hours for this
6 deposition. I don't want to go into the deposition
7 without having all the documents or getting the
8 documents a day or two or three before.

9 We've had, frankly, a lot of problems
10 with the document productions where you have said we
11 get other documents three days before and we get the
12 documents at 10 PM at night or the following morning.
13 And I haven't raised those with your Honor, I've
14 tried to live in the real world with the plaintiffs.
15 But I don't want to go forward with this deposition
16 in a week if we're not going to have the documents
17 seven days before.

18 It's already quarter of six, it's clear
19 that we're not going to get all of the documents
20 today. So our request is that the plaintiffs be
21 ordered to do the production within, I don't know,
22 two days, if that's enough time, three days, and then
23 we get a new date for the deposition of Dr.
24 Smith-Bindman.

25 SPECIAL MASTER SCHNEIDER: I don't

1 think J&J should be prejudiced because of a late
2 production.

3 If J&J, given the realities of the
4 situation, is agreeable to putting off the deposition
5 of Dr. Smith-Bindman for a very short time, that's
6 fine with me. So I'm perfectly comfortable, if J&J
7 and the plaintiffs agree, to put off the dep to get a
8 new date reasonably close to the current date.

9 In terms of a realistic date to produce
10 the documents at issue, I don't want to be in the
11 same position, if we order it by Monday or Tuesday,
12 that we're in today where plaintiffs are going to say
13 we used our best efforts, but yet we don't have an
14 answer yet.

15 I was of the belief, Ms. Sharko, that
16 if we kept the deposition on or set a new date
17 reasonably close with the proviso that if the
18 documents were not timely produced, you would depose
19 Dr. Bindman again, that would incentivize her to
20 produce the documents promptly.

21 So, Mr. Lapinski, plaintiffs, help me,
22 when are these documents going to be produced?

23 MR. LAPINSKI: Your Honor, I just
24 received an email from Dr. Smith-Bindman that went to
25 my -- it's on hold in my network and I'm not sure why

1 it's on hold in my network, but she just sent me an
2 email, she sent me a second one saying just confirm
3 that you received this. I don't know what she's
4 sending in to me right now. I can't sit here and
5 represent to you that it's everything that's going to
6 be needed.

7 Our intention is to be able to get the
8 documents from Dr. Smith-Bindman today, be able to
9 produce them today, that's all I can represent as I
10 sit here right now without being able to speak
11 directly to Dr. Smith-Bindman and see what she's
12 sending over to me.

13 If you want to give me the opportunity
14 to send an update email, as soon as I've spoken with
15 her I can send an update email to Ms. Sharko and
16 include you on the email so that you have an
17 understanding of what we're dealing with, I'm happy
18 to do that.

19 You know, I think on the plaintiffs'
20 side, we're also amenable to rescheduling the
21 deposition and pushing it out for a couple of days to
22 a week so that Ms. Sharko has the documents in time
23 for her to be able to prepare for the deposition.

24 SPECIAL MASTER SCHNEIDER: I don't mean
25 to interrupt, Mr. Lapinski. I'm sorry. But why

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1 don't I leave it, as I like to do, in counsels' very
2 capable hands.

3 Can you consult with Ms. Sharko and
4 whatever you agree to is fine with me. I'll order
5 it, whatever you agree to. You need an opportunity
6 to find out from the doctor realistically when you're
7 going to get the production complete and then you and
8 Ms. Sharko can work on a new date or place for the
9 deposition.

10 So maybe you work that out by tomorrow,
11 but if you don't work it out by Monday, Ms. Sharko,
12 let me know and we'll have another Zoom and I'll
13 order whatever is reasonable under the circumstances,
14 but hopefully you'll be able to work this out with
15 the plaintiffs by tomorrow sometime, after Mr.
16 Lapinski has an opportunity to talk to the doctor.

17 MS. SHARKO: That's fine. I appreciate
18 it, Judge.

19 Dan, why don't you let me know when is
20 good to talk tomorrow. We'll consider that the
21 deposition on September 23 is off and then also get
22 me a couple dates that would work for the deposition
23 and then we can reverse engineer the document due
24 date.

25 MR. LAPINSKI: Susan, I will follow up

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1 with you sometime in the afternoon since she's on
2 west coast and it will give her an opportunity
3 tomorrow morning in addition to tonight to be able to
4 get to me all the substantive information. So if you
5 want me to just give you a call, I can, or if you
6 want to schedule a time.

7 SPECIAL MASTER SCHNEIDER: Counsel for
8 the university, having heard what goes on at these
9 conferences, are you sure you want to intervene in
10 the case?

11 MS. HAAS GEORGIEV: I wasn't saying I'm
12 sure of anything, but I want to have some rights in
13 case I need them. But I thank you, your Honor, and I
14 also thank all the professional counsel for staying
15 late and hearing our concerns and addressing them.

16 MS. SHARKO: Sure. Thanks.

17 Dan, if you can give me a call around
18 one tomorrow, maybe we can get this squared away
19 before the plaintiffs' next Zoom court emergency in
20 state court.

21 MR. LAPINSKI: Okay.

22 MS. SHARKO: Okay. Thanks.

23 MR. LAPINSKI: All right. Very good.

24 SPECIAL MASTER SCHNEIDER: Thank you,
25 counsel.

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1 MR. LAPINSKI: Thank you, very much,
2 your Honor. Have a good evening.

3 (Hearing concluded)
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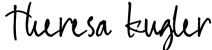
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C E R T I F I C A T E

I, Theresa Mastroianni Kugler, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.

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Commission Expires July 11, 2026
Commission No. 2410394
Date: September 17, 2021

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